No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORPORATION,
Petitioner,

v.

TROY LAMBERT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

GREGORY S. WESTON
ANDREW HAMILTON
THE WESTON FIRM
1405 Morena Blvd.
Suite 201
San Diego, CA 92110
(619) 798-2006
greg@westonfirm.com
andrew@westonfirm.com

JONATHAN A. HERSTOFF
HAUG PARTNERS LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
jherstoff@haugpartners.com

RONALD A. MARRON
COUNSEL OF RECORD
MICHAEL HOUCHIN
THE LAW OFFICES OF
RONALD A. MARRON, APLC
651 Arroyo Drive
San Diego, CA 92103
(619) 696-9006
(619) 564-6665 (fax)
ron@consumersadvocates.com
mike@consumersadvocates.com

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Are nonjurisdictional claim-processing rules categorically immune to equitable exceptions?

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STATEMENT

This is a small case involving an issue of little wider concern, and is a poor vehicle for certiorari. The Question Presented is whether Federal Rule of Civil Procedure 23(f), a nonjurisdictional claim-processing rule, can be subject to an equitable exception in those rare circumstances where a Circuit Court of Appeals finds the facts warrant. This question, however, is premised on Petitioner Nutraceutical Corporation's ("Nutraceutical") assumption that the timing of Respondent Troy Lambert's ("Lambert") petition for permission to appeal violated Rule 23(f) in the first instance. *See* Pet. 3[1] (stating that Lambert "fail[ed] to timely file a Rule 23(f) petition or a motion for reconsideration within the fourteen-day window"); Pet. 6 (stating that "Lambert did not file a petition or a motion for reconsideration by [March 6, 2015]"); Pet. 7 (stating that Lambert's petition for permission to appeal was "filed more than four months late"). But Nutraceutical is incorrect, because its theory hinges entirely on the erroneous premise that Lambert's reconsideration motion was untimely. In fact, after the district court entered an order decertifying this class action, Lambert timely presented an oral motion for reconsideration to the district court at a status conference on March 2, 2015—10 days after the original decertification order—and followed up with a written motion for reconsideration on March 12, 2015—20 days after the original decertification order.

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[1] Nutraceutical's petition for a writ of certiorari is cited as "Pet. ___" and its appendix as "Pet. App. ___." The record for the 23(f) petition is cited as "CA Pet. Rec. ___" and "CA Rec. ___" for the case itself. The district court record is cited as "Dist. Ct. Rec. ___."

Lambert's request for reconsideration was therefore timely under the Federal Rules. *See* Fed. R. Civ. P. 7(b)(1) (providing that an oral motion can be made at a hearing); Fed. R. Civ. P. 59(e) (providing that "[a] motion to alter or amend a judgment" can be filed "no later than 28 days after the entry of the judgment"); *see also* Fed. R. Civ. P. 54(a) (defining "judgment" as "any order from which an appeal lies"); Fed. R. Civ. P. 23(f) (providing for "an appeal from an order granting or denying class-action certification"). (Besides timely under these federal rules, it was also filed on the day specified by the district court.) Thus, the Question Presented is actually not presented, because Lambert's reconsideration motion and appeal were timely under any standard. Certiorari should therefore be denied.

The relevant facts are as follows. In 2013, Lambert, on behalf of himself and others similarly situated, filed suit alleging that Nutraceutical violated California consumer fraud law with the sale of its Cobra Sexual Energy pill. Pet. App. 53. In 2014, the district court granted class certification. Pet. App. 28. After the initial district judge's retirement and the case's reassignment, Nutraceutical moved to decertify on a number of grounds. Pet. App. 4. On February 20, 2015, the district court granted the motion, rejecting some of Nutraceutical's arguments, but agreeing that the plaintiff had failed to accumulate evidence sufficient to calculate restitution under California law. Pet. App. 4. At a status conference on March 2, 2015—10 days later—Lambert asked the district court to recertify the class, outlining the evidence that had been adduced with respect to damages, and requesting leave to present that evidence in written form. Pet. App. 5; Pet. App. 14; Pet. App. 71-76. The district court set a

briefing and hearing schedule for that motion. Pet. App. 76. In accordance with the district court's order and Federal Rule of Civil Procedure 59(e), Lambert filed the motion for reconsideration on March 12, 2015, the date set by the district court, and 20 days after the decertification order. Pet. App. 5; Dist. Ct. Rec. 183.

On June 24, 2015, the district court denied Lambert's motion for reconsideration. Pet. App. 27-51. The district court recognized the reconsideration motion as a motion under Rule 59(e), and invoked the Rule 59(e) standards in deciding the motion. Pet. App. 29-31. Although it did not recertify the class as Lambert hoped, it modified its prior order in agreement with one of Lambert's arguments: that the decertification order erred by not providing for notice of decertification to the class. Pet. App. 49-50. Fourteen days later, Lambert petitioned the Ninth Circuit for permission to appeal under Rule 23(f), which was granted. Pet. 7; CA Pet. Rec. 1; Pet. App. 6. After briefing and oral argument, the Ninth Circuit: (i) concluded that the appeal was timely; and (ii) reversed the district court's decertification because it involved a misapplication of California restitution law. Pet. App. 1-26. Nutraceutical now seeks this Court's review of the Ninth Circuit's timeliness conclusion, but does not challenge the Ninth Circuit's decision on the merits.

Certiorari should be denied. The Question Presented—i.e., whether Rule 23(f) can be subject to equitable exceptions—is premised on the assumption that the timing of Lambert's petition for permission to appeal ("Lambert's appeal") required the fourteen-day time period in Rule 23(f) to be equitably tolled. While

the Ninth Circuit was correct in finding that under the circumstances, equitable tolling was appropriate, it need not have reached the issue.

First, in at least three independent ways, Lambert timely sought reconsideration of the district court's decertification order. Lambert's March 2, 2015 oral request for the district court to revisit its February 20 decertification order (along with his reasons for so requesting) constituted a "motion" under Federal Rule of Civil Procedure 7(b)(1). Moreover, Lambert's March 12, 2015 written motion for reconsideration was filed well within the 28-day timeframe for filing a motion under Federal Rule of Civil Procedure 59(e). Under this Court's longstanding case law, such timely motions for reconsideration cause the deadline to appeal to run from the date that the district court disposes of the reconsideration motion—not the date of the original decision. Additionally, Federal Rule of Civil Procedure 23(c)(1)(C) provides that a certification decision "may be altered or amended before final judgment." The district court's June 24, 2015 denial of reconsideration "altered or amended" its previous order by both discussing in more detail the reasons for decertification, and also by correcting the prior order's failure to provide for notice of decertification. Pet. App. 50; *see also* Pet. App. 6 (recognizing that "the [reconsideration] order set forth a plan for notifying the class regarding decertification"). Because Lambert's petition for permission to appeal was filed on July 8, 2015—within 14 days of the district court's June 24, 2015 denial of reconsideration—the appeal was timely without the need to invoke any equitable exceptions.

Second, Nutraceutical forfeited and waived its right to argue that Lambert's March 12, 2015 motion for reconsideration was untimely, and that Rule 23(f) is insusceptible to equitable exceptions. At the March 2 status conference, the district court set a March 12 deadline for Lambert file a written motion for reconsideration, and Nutraceutical did not object to this timing, despite being given an opportunity to comment. Pet. App. 76-77. Nor did Nutraceutical object to the timing in its opposition to Lambert's motion for reconsideration. Dist. Ct. Rec. 189. Instead, Nutraceutical waited until after the district court decided the motion on the merits. CA Pet. Rec. 7-1; CA Rec. 15. Therefore, Nutraceutical cannot now be heard to argue that the motion was untimely. Moreover, during oral argument before the Ninth Circuit, Nutraceutical expressly stated that Rule 23(f) can be subject to equitable considerations such as the unique-circumstances doctrine, and therefore forfeited and waived the right to argue to this Court that nonjurisdictional claim-processing rules are categorically immune to equitable exceptions.

Third, the facts of this case do not implicate any circuit conflict. Nutraceutical's cited cases mostly involve motions for reconsideration that were filed well outside the deadline for filing a motion under Rule 59(e). There is no indication from any of these cited cases that any other circuit would have dismissed Lambert's appeal as untimely, given that Lambert's motion for reconsideration was filed well within the Rule 59(e) timeframe, and Lambert's appeal was filed within 14 days of the denial of the motion for reconsideration. Fed. R. Civ. P. 23(f). Nor did any of these cases squarely address the question of whether

claim-processing rules such as Rule 23(f) are subject to equitable exceptions. Therefore, this case presents no circuit conflict for this Court to resolve.

Fourth, the Federal Rules and this Court's longstanding case law—as well as case law from the courts of appeals—confirm that nonjurisdictional claim-processing rules in the Federal Rules are generally subject to equitable exceptions. As this Court has long recognized, the Federal Rules are designed to facilitate disposition of cases on the merits. Nothing in this Court's precedents (or in cases from the courts of appeals) supports Nutraceutical's proposed rule that claim-processing rules are categorically immune to equitable exceptions.

In sum, the Ninth Circuit's judgment represents a straightforward and correct application of this Court's precedents and the Federal Rules, and no other court of appeals would rule differently if faced with the facts presented here. Moreover, because Lambert's appeal was timely under the Federal Rules and this Court's precedents—and because Nutraceutical forfeited and waived the right to argue to the contrary—this case presents no need to consider whether nonjurisdictional rules are subject to equitable exceptions. Therefore, this case is an unsuitable vehicle for deciding the Question Presented, and the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. This Case Is a Poor Vehicle Because Several Antecedent Legal Principles Resolve the Case Without Reaching the Question Presented

A. Lambert's Appeal Was Timely Under the Federal Rules and This Court's Longstanding Precedents, thus Presenting No Need to Consider Any Equitable Exceptions

The Question Presented—i.e., whether mandatory claim-processing rules can be subject to equitable exceptions—is premised on the assumption that the timing of Lambert's appeal violated Federal Rule of Civil Procedure 23(f). But this assumption is incorrect. *First*, at a status conference held 10 days after the district court's decertification order, Lambert orally presented the district court with reasons why the class should be recertified. This presentation constitutes an oral motion under the Federal Rules of Civil Procedure. Therefore, even under Nutraceutical's apparent view that a reconsideration motion must be filed within 14 days of the decertification order in order to postpone the period to seek appellate review under Rule 23(f), Lambert's appeal was timely. *Second*, Lambert's written motion for reconsideration was filed 20 days after the decertification order, and was therefore timely under Federal Rule of Civil Procedure 59(e). Under the Federal Rules and this Court's precedents, such a timely motion causes the time to appeal to run from the disposition of the reconsideration motion, not from the original order. Because Lambert's appeal was filed within 14 days of the district courts' disposition of the

reconsideration motion, the appeal was timely. *Third*, Federal Rule of Civil Procedure 23(c)(1)(C) provides that a certification decision "may be altered or amended before final judgment." The district court's June 24, 2015 denial of reconsideration altered its previous order by providing instructions about notifying the class about the decertification. Because Lambert's petition for permission to appeal was filed on July 8, 2015—within 14 days of the district court's June 24, 2015 denial of reconsideration—the appeal was timely without the need to invoke any equitable exceptions.

1. Lambert Timely Moved for Reconsideration at the March 2, 2015 Hearing

At the district court's status conference on March 2, 2015, Lambert orally outlined the reasons why the district court should recertify the class. Pet. App. 71-72. In other words, Lambert presented an oral motion seeking the district court's reconsideration of the decertification order. Oral motions are permitted if "made during a hearing or trial." Fed. R. Civ. P. 7(b)(1)(A). As the Ninth Circuit recognized, Lambert, at the March 2 hearing, "informed the court of his intention to file a motion for reconsideration" and "explained that he had a damages model and evidentiary support for it." Pet. App. 5; *see also* Pet. App. 13-14. Accordingly, even if this Court were to accept Nutraceutical's argument that Lambert's motion for reconsideration had to be filed within 14 days of the district court's decertification order (which it should not, as explained below), Lambert's March 2, 2015 oral motion—made 10 days after the decertification

order—was timely even under Nutraceutical's proposed standard. Therefore, Lambert's time to appeal began to run on June 24, 2015—when the district court disposed of the reconsideration motion. Because Lambert's appeal was in full compliance with the Federal Rules, this case presents the Court with no need to consider whether nonjurisdictional claim-processing rules are subject to equitable exceptions.

2. Lambert's March 12, 2015 Motion for Reconsideration Was Timely Under Federal Civil Rule 59(e)

The district court's February 20, 2015 decertification order constitutes a "judgment" within the meaning of the Civil Rules, because it is "an[] order from which an appeal lies." Fed. R. Civ. P. 54(a); *see also* Fed. R. Civ. P. 23(f) (providing that a court of appeals may permit "an appeal from an order granting or denying class-action certification"). And under Federal Rule of Civil Procedure 59(e), a party may move to alter or amend a judgment "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).[2] Lambert's motion for reconsideration was filed on March 12, 2015—20 days after the district court's decertification order, and therefore well within the 28-day timeframe set forth in Rule 59(e). Accordingly, as explained in more detail below, the motion for reconsideration postponed the time to appeal, and Lambert's appeal was therefore due within 14 days of the denial of the motion for reconsideration,

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[2] Until 2009, this 28-day deadline was instead a 10-day deadline. Similarly, until 2009, there was a 10-day deadline to file a petition for permission to appeal under Rule 23(f).

and was filed within this time. Because Lambert's petition was timely filed, this Court would have no reason to consider any equitable exceptions in order to affirm the Ninth Circuit's judgment.

A motion falls under Rule 59(e) "where it involves 'reconsideration of matters properly encompassed in a decision on the merits.'" *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989) (quoting *White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 451 (1982)). Here, Lambert's motion for reconsideration asked the district court to vacate its decertification order (i.e., the order giving rise to an interlocutory appeal under Rule 23(f)), and recertify the class. The motion for reconsideration was therefore a Rule 59(e) motion, and indeed, the district court recognized it as such. Pet. App. 29 (recognizing that "a motion for reconsideration brought within 28 days of the entry of judgment is treated as a motion under Rule 59(e)" and invoking the standards under Rule 59(e) in deciding Lambert's motion for reconsideration); *see also McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (recognizing that a motion for reconsideration of an order denying class certification is a Rule 59 motion).

As many courts have recognized, Rule 59(e) applies not only to final judgments, but also to interlocutory orders from which an appeal could lie. The Ninth Circuit recognized as much during oral argument here, and at least twice suggested that Lambert's reconsideration motion was in accordance with Rule 59. Oral Argument at 2:36-38 and 14:15-36, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/

view.php?pk_id=0000030181. Additionally, the First Circuit held that a motion for reconsideration of an appealable interlocutory order constituted a Rule 59(e) motion because the underlying order was "an order from which an appeal lies" under Rule 54(a). *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7-8 (1st Cir. 2005). Accordingly, the First Circuit held the time to appeal ran from the disposition of the reconsideration motion, not from the date of the original order. *Id.* Other decisions are in accord. *See, e.g.*, *Auto Servs. Co. v. KPMG, LLP*, 537 F.3d 853, 856 (8th Cir. 2008) (noting that for purposes of Civil Rules 54(a) and 59(e) and Appellate Rule 4(a)(4)(A)(iv), a "'judgment' encompasses both a final judgment and an appealable interlocutory order"); *Robertson v. Monsanto Co.*, 287 F. App'x 354, 358 (5th Cir. 2008) (applying the definition of "judgment" set forth in Rule 54(a) to interlocutory appeals under Rule 23(f)); *Lichtenberg v. Besicorp Grp. Inc.*, 204 F.3d 397, 400-01 (2d Cir. 2000) (recognizing that a "judgment" under the Civil Rules encompasses both a final judgment and an appealable interlocutory order); *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989) (same); *Rodriguez v. Banco Cent.*, 790 F.2d 172, 175-76 (1st Cir. 1986) (finding that Rule 59(e) applies to interlocutory orders based on Rule 54(a) and noting that "[l]ittle purpose would be served in penalizing a party for requesting a district court to reconsider a disputed interlocutory ruling before attempting to take its grievance to the court of appeals"). Here, the district court's decertification order constitutes an "order granting or denying class-action certification" from which "[a] court of appeals may permit an appeal" and is therefore "an order from which an appeal lies." Fed. R. Civ. P. 23(f); Fed. R. Civ. P. 54(a). Lambert's motion for reconsideration of the

decertification order therefore was a timely motion under Rule 59(e).

3. Because Lambert's Reconsideration Motion Was Timely, He Had Until July 8, 2015 to File His Rule 23(f) Petition

This Court has long held that a timely filed motion for reconsideration causes the time to appeal to run from the disposition of the reconsideration motion. For instance, this Court summarily reversed the Tenth Circuit for concluding that a motion for rehearing did not toll the time to appeal and dismissing the appeal as untimely, and recognized that in both civil and criminal cases, "a motion for rehearing . . . renders an otherwise final decision of a district court not final until it decides the petition for rehearing." *United States v. Ibarra*, 502 U.S. 1, 6 (1991). Under this rule, "district courts are given the opportunity to correct their own alleged errors, and allowing them to do so prevents unnecessary burdens being placed on the courts of appeals." *Id.* at 5. Indeed, it has been "the consistent practice in civil and criminal cases alike . . . to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending." *United States v. Dieter*, 429 U.S. 6, 8 (1976). In recognizing this principle, this Court dismissed the Tenth Circuit's "concern with the lack of a statute or rule expressly authorizing treatment of a [reconsideration] motion as suspending the limitation period[,]" and instead concluded that it has been a "'traditional and virtually unquestioned practice'" for the time to appeal to run from the disposition of a timely reconsideration motion. *Id.* at 8,

8 n.3 (quoting *United States v. Healy*, 376 U.S. 75, 79 (1964)); *see also Healy*, 376 U.S. at 80 (recognizing "the ordinary rule" that an appeal need not be filed while a petition for rehearing is under consideration); Fed. R. App. P. 4(a)(4)(A)(iv) (providing that where a timely motion has been filed under Rule 59, "the time to file an appeal runs for all parties from the entry of the order disposing of" that motion); *Gelder v. Coxcom Inc.*, 696 F.3d 966, 970-971 (10th Cir. 2012) (O'Brien, J., concurring) (recognizing that the timely filing of a motion listed in Appellate Rule 4(a)(4)(A) postpones the time to petition for permission to appeal under Rule 23(f)).

Because Lambert filed his reconsideration motion on March 12, 2015—well within the 28-day period following the district court's February 20, 2015 decertification order—the reconsideration motion was timely under Rule 59(e). The February 20 decertification order therefore did not become final until June 24, 2015, when the district court disposed of the reconsideration motion. The 14-day period for Lambert to petition for permission to appeal under Rule 23(f) therefore did not begin to run until June 24, 2015. Accordingly, Lambert's July 8, 2015 petition for permission to appeal—filed 14 days after the June 24 order—was timely. Fed. R. Civ. P. 23(f) (providing that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered").

Because Lambert's appeal was timely under the Federal Rules and under this Court's longstanding

precedents, the Ninth Circuit's judgment can be affirmed on that basis. This case, therefore, "involves no issue of equitable tolling or any other equity-based exception." *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004).

Nor does this case involve any violation of Appellate Rule 26(b)(1), contrary to Nutraceutical's argument. Pet. 18-20. Rule 26(b)(1), in relevant part, prohibits a court from extending the time for filing a petition for permission to appeal. Fed. R. App. P. 26(b)(1). But here, neither the Ninth Circuit nor the district court extended the time for Lambert to petition for permission to appeal. Rather, assuming *arguendo* that Lambert ordinarily would have been required to file a written motion for reconsideration within 14 days of the decertification order,[3] the district court simply gave Lambert a six-day extension of time (from March 6, 2015 to March 12, 2015) to file the motion. Nothing in the Federal Rules prohibits a court from extending the time to file a motion for reconsideration. *See* Fed. R. App. P. 26(b)(1) (listing time periods that cannot be extended); Fed. R. Civ. P. 6(b)(2) (same). Therefore, because Lambert filed the motion within the time set by the district court, the motion for reconsideration was timely, and the time to appeal ran from the district court's disposition of the motion. *Ibarra*, 502 U.S. at 6; *Dieter*, 429 U.S. at 8; *Healy*, 376 U.S. at 80. Because Lambert filed his Rule 23(f) petition for permission to appeal on July 8, 2015—within 14 days of the district court's June 24, 2015 denial of reconsideration—Lambert's appeal was timely.

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[3] As explained in detail above, Lambert was not, in fact, subject to a 14-day deadline to move for reconsideration.

Simply put, Lambert's appeal was timely under the Federal Rules and this Court's precedents, so there is no need to consider any equitable exceptions. Accordingly, this case is a poor vehicle because it does not afford this Court the opportunity to decide the Question Presented.

4. Lambert's Appeal Was Also Timely Based on the Plain Language of Rule 23

A certification decision "may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). The district court's initial decertification order (Pet. App. 27-51) was defective because it did not provide a plan for notice of class decertification. *See* Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(c)(3)(B). The district court's June 24, 2015 denial of reconsideration altered its previous order by dealing, as was required, with notice to the class of the decertification. Pet. App. 50. Accordingly, because Lambert filed his Rule 23(f) petition for permission to appeal within 14 days of the district court's altered decertification order, the Rule 23(f) petition was timely, without the need to consider any equitable exceptions.

More broadly, the order denying reconsideration of the decertification simply falls into the category of "an order granting or denying class-action certification." Fed. R. Civ. P. 23(f). In substance, the motion, had it been granted, would have created a certified class that had been previously decertified. The district court denied the motion, so its order was thus "an order . . . denying class-action certification." *Id.* Because a Rule 23(f) petition for permission to appeal is due "within 14 days after the order [denying class-action

certification] is entered," *id.*, and Lambert's petition was filed on July 8, 2015—within that timeframe—Lambert's appeal was timely under the plain language of Rule 23(f). As squarely as the reconsideration order here falls within Rule 23(f)'s language, other Circuit Courts have applied it more expansively, to orders modifying the scope of the class, or decertifying a class. For instance, in *Glover v. Standard Fed. Bank*, 283 F.3d 953, 956-58 (8th Cir. 2002), the decision "granting or denying class-action certification" was an order that changed the class definition of an earlier-certified class.

B. Nutraceutical's Multiple Acts of Forfeiture and Waiver Are Obstacles to Consideration of the Question Presented

Although Lambert's appeal was timely under the Federal Rules and this Court's precedents for the reasons discussed above, certiorari should also be denied because Nutraceutical, through its actions and omissions in the district court and in the Ninth Circuit, forfeited and waived its right to argue: (i) the Question Presented; and (ii) that the reconsideration motion was untimely. These acts of forfeiture and waiver make this case an unsuitable vehicle.

1. Nutraceutical Committed Forfeiture and Waiver Before the District Court

At the March 2, 2015 status conference—within 14 days from the district court's original decertification order—the district court set a deadline of March 12, 2015 for Lambert to file a motion for reconsideration. Pet. App. 76. When given an opportunity to raise any concerns prior to adjournment of the conference,

Nutraceutical raised none. Pet. App. 77. Because Nutraceutical declined to raise any objection to the briefing schedule, it "wait[ed] too long to raise the point" and therefore forfeited any argument that the March 12, 2015 reconsideration motion was untimely. *Kontrick*, 540 U.S. at 456. Moreover, Nutraceutical's express decision not to raise any concerns at the status conference when given the opportunity to do so constitutes an "intentional relinquishment or abandonment of a known right" (*id.* at 458 n.13) and is therefore a waiver of the right to argue that the reconsideration motion—filed within the time set by the district court at the status conference—was out of time.

Additionally, Nutraceutical forfeited its right to argue that the reconsideration motion was untimely because in its opposition to the motion for reconsideration, Nutraceutical raised no timeliness objection to the district court, instead raising its objections for the first time before the Ninth Circuit after the district court ruled on the reconsideration motion. Nutraceutical's failure to raise any objection to the timeliness of the motion until after the motion was decided on the merits constitutes a forfeiture of Nutraceutical's timeliness objection. *See Eberhart v. United States*, 546 U.S. 12, 18-19 (2005) (finding that the Government had forfeited an objection to a motion that was untimely under the Federal Rules where no objection was raised until after the district court decided the motion on the merits); *Kontrick*, 540 U.S. at 447 (finding a forfeiture of the right to assert untimeliness of a claim where no objection to timeliness was raised until after the claim was adjudicated on the merits).

At least two courts of appeals have found forfeiture in circumstances similar to those here. For example, when a Rule 59(e) motion was untimely filed without objection from the appellee but the appellee later claimed that the untimely motion failed to suspend the time to appeal, the D.C. Circuit: (i) found a forfeiture of the timeliness objection; and (ii) concluded that this forfeiture precluded any argument that the Rule 59(e) motion did not suspend the time to appeal. *Obaydullah v. Obama*, 688 F.3d 784, 788-91 (D.C. Cir. 2012);[4] *see also Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 475-76 (6th Cir. 2007) (finding that the forfeiture of a timeliness objection to a Rule 59(e) motion meant that the Rule 59(e) motion tolled the time to appeal and "discern[ing] no reason for holding that an otherwise properly filed motion that was considered by the district court would fail to toll the time for filing a notice of appeal"); *In re Onecast Media, Inc.*, 439 F.3d 558, 562-63 (9th Cir. 2006) (finding forfeiture of an argument that a reconsideration motion was untimely and adjudicating the case on the merits).

2. Nutraceutical Committed Forfeiture and Waiver Before the Ninth Circuit

During oral argument before the Ninth Circuit, Nutraceutical expressly stated that Rule 23(f) can be subject to equitable considerations such as the unique-

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[4] Although Fed. R. App. P. 4(a)(4)(A) was subsequently amended on December 1, 2016 to no longer permit untimely motions listed in Rule 4(a)(4)(A) to toll the time to appeal, the relevant events here (i.e., the decertification order, the motion for reconsideration, and the Civil Rule 23(f) petition) all took place in 2015, and are therefore governed by the pre-2016 version of the Appellate Rules.

circumstances doctrine. In particular, Nutraceutical recognized that with respect to Rule 23(f), a court has the "power to exercise its equitable powers" through doctrines such as the unique-circumstances doctrine. Oral Argument at 24:14-28, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181. Accordingly, Nutraceutical forfeited and waived the right to argue—as it does throughout its petition—that nonjurisdictional claim-processing rules in general (and Rule 23(f) specifically) are insusceptible to equitable exceptions. Simply put, because Nutraceutical admitted that Rule 23(f) can be subject to equitable exceptions, Nutraceutical cannot now be heard to argue to the contrary. Indeed, the Ninth Circuit's recognition that nonjurisdictional rules can be subject to equitable exceptions is entirely consistent with Nutraceutical's statement during oral argument. Nutraceutical's statement constitutes forfeiture and waiver of its right to argue the Question Presented, thus making this case an unsuitable vehicle.

In sum, Nutraceutical forfeited and waived the right to argue: (i) the Question Presented; and (ii) that Lambert's reconsideration motion was untimely—an assumption on which the Question Presented is based. Nutraceutical's forfeiture and waiver resolve this case, without the need to consider whether claim-processing rules are subject to equity-based exceptions. *See Kontrick*, 540 U.S. at 457-58. Because there are multiple obstacles to reaching the Question Presented, this case is a poor vehicle. Consequently, certiorari should be denied.

C. Given the Unique Posture of This Case, a Decision Regarding the Timeliness of the Appeal Is Unlikely to Have Any Effect on the Outcome of the Case

This case is in a unique posture. Since the Ninth Circuit accepted Lambert's appeal, the district-court case has been stayed, and no final judgment has been issued. Moreover, the Ninth Circuit concluded that Lambert's appeal was timely, and then reversed the district court's decertification order on the merits because the decertification order was legally erroneous on a matter of California substantive law. If this Court concluded that Lambert's appeal should have been dismissed as untimely, the case would return to the district court, which would then have the benefit of the Ninth Circuit's opinion concluding that the decertification order was erroneous. Although the Ninth Circuit's decision would not be controlling if vacated by this Court as untimely,[5] it would nevertheless be persuasive authority on the merits. Under these circumstances, the district court likely would simply recertify the class given the Ninth Circuit's guidance.[6] *See* Fed. R. Civ. P. 23(c)(1)(C) (providing that a certification decision "may be altered or amended before final judgment"); *see also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 479 n.9 (2013) (district courts may alter or amend class-

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[5] Nutraceutical did not seek this Court's review of the Ninth Circuit's decision on the merits.

[6] Indeed, if the district court failed to recertify the class, the Ninth Circuit almost certainly would reverse when the case returns to the Ninth Circuit after entry of judgment.

certification orders "based on circumstances developing as the case unfolds"); *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.").

Because a decision regarding the timeliness of Lambert's interlocutory appeal is highly unlikely to affect the ultimate outcome of this case, this Court should deny certiorari.

II. This Case Does Not Implicate Any Circuit Conflict

As discussed above, Lambert's reconsideration motion was timely under Rule 59(e), and the time to petition for permission to appeal under Rule 23(f) therefore ran from June 24, 2015, when the district court disposed of the motion. The cases cited by Nutraceutical that purportedly establish a circuit conflict do not involve reconsideration motions filed within the deadline set by Rule 59(e) (such as Lambert's motion for reconsideration here), and are therefore factually distinguishable from this case:

- *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193-94 (3d Cir. 2008): The Third Circuit found a Rule 23(f) petition for permission to appeal to be untimely because the January 19, 2007 motion for reconsideration was filed 30 days after the order denying class certification. Unlike here, the reconsideration motion was therefore filed far outside the then-applicable 10-day period for filing a Rule 59(e) motion or a Rule 23(f) petition. *Gutierrez* therefore had no

occasion to consider whether a timely reconsideration motion under Rule 59(e) suspends the period to petition for permission to appeal under Rule 23(f).

- *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 30-31 (2d Cir. 2011): The Second Circuit found a Rule 23(f) petition to be untimely where, unlike here, the petition was filed "more than eighteen months after Rule 23(f)'s deadline for interlocutory appeals" and was untimely even when the deadline was calculated from the date of the reconsideration decision.

- *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014): The Fourth Circuit found a Rule 23(f) petition to be untimely when based on a fourth motion for decertification, filed two years after the original certification order, and therefore, unlike here, far outside the time period permitted by Rule 59(e).

- *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1290-91 (11th Cir. 2007): The Eleventh Circuit found a Rule 23(f) petition to be untimely where, unlike here: (i) the initial petition for permission to appeal was filed outside the then-applicable 10-day deadline under Rule 23(f) and (ii) no reconsideration motion was filed; but (iii) the district court simply vacated and reentered its order for purposes of re-starting the appeal clock. The Eleventh Circuit rejected the district court's attempt to circumvent Rule 23(f) by simply vacating and reentering its order.

- *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1192 (10th Cir. 2006): The Tenth Circuit dismissed a Rule 23(f) appeal as untimely where, unlike here, the relevant reconsideration motion was filed many months after the challenged district-court orders—far outside the time permitted by Rule 59(e). No equitable considerations were invoked.

- *Coco v. Inc. Vill. of Belle Terre, New York*, 448 F.3d 490, 491-92 (2d Cir. 2006): The Second Circuit denied a Rule 23(f) petition as untimely where, unlike here, the party simply filed the petition for permission to appeal out of time. No reconsideration motion was involved, and no equitable considerations were invoked.

- *McNamara v. Felderhof*, 410 F.3d 277, 279 (5th Cir. 2005): The Fifth Circuit dismissed a Rule 23(f) petition as untimely where, unlike here, the motion for reconsideration was filed more than two months after the order denying class certification—well outside the time permitted by Rule 59(e).

- *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004): The Tenth Circuit denied a Rule 23(f) petition where, unlike here, the petitioner simply missed the Rule 23(f) deadline, and the district court—in violation of Appellate Rule 26(b)—purported to grant an extension of time to appeal. The case involved no reconsideration motion.

- *Gary v. Sheahan*, 188 F.3d 891, 892-93 (7th Cir. 1999): The Seventh Circuit dismissed a Rule 23(f) petition as untimely where the "belated motion for reconsideration" was filed more than one year after the challenged district-court order—far outside the Rule 59(e) deadline.

In sum, nothing in Nutraceutical's cited cases: (i) suggests that any court would have found Lambert's appeal to be untimely; or (ii) decides whether nonjurisdictional claim-processing rules can be subject to equitable exceptions. Put differently, Nutraceutical's cited cases are fully reconcilable with the Ninth Circuit's conclusion that Lambert's appeal was timely. This case therefore does not present the Court with any circuit conflict to resolve.

III. The Ninth Circuit Correctly Recognized that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

As explained in detail above, the timing of Lambert's appeal was in full compliance with the Federal Rules, thus presenting this Court with no need to consider whether equitable exceptions can apply to nonjurisdictional claim-processing rules such as Rule 23(f). Nevertheless, the Ninth Circuit's recognition that such rules can be subject to equitable exceptions (*see* Pet. App. 10) is fully in accord with this Court's longstanding precedents and precedents from lower courts, which confirm that equitable exceptions can apply to nonjurisdictional claim-processing rules. None of Nutraceutical's cited cases—and none that Lambert could locate—hold to the contrary. Therefore, certiorari should be denied.

A. This Court's Precedents Demonstrate that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

This Court has long recognized equitable exceptions to provisions set forth in the Federal Rules. Especially illustrative is this Court's longstanding principle that a timely filed motion for reconsideration postpones the time to appeal, even when there is no "statute or rule expressly authorizing treatment of a [reconsideration] motion as suspending the limitation period[.]" *Dieter*, 429 U.S. at 8 n.3; *accord Ibarra*, 502 U.S. at 6; *Healy*, 376 U.S. at 80. The fact that this exception is so well-accepted by this Court—and has been for many decades—demonstrates that the Rules cannot be construed in the rigid and unyielding manner that Nutraceutical seeks.

Other decisions from this Court further demonstrate that the Rules are subject to equitable exceptions. For instance, in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964), a party's motion for a new trial was belatedly filed, but the district court assured him that the motion was filed "in ample time." *Thompson*, 375 U.S. at 386. The party filed a notice of appeal within 60 days of the district court's disposition of the motion for a new trial, but not within 60 days of the original judgment. *Id.* at 384-86. Had the motion actually been filed "in ample time," the time to file a notice of appeal would not have begun to run until the district court disposed of the motion. *Id.* at 385-86. However, because the motion was untimely, the filing of the motion did not toll the time to appeal.

Id. The Seventh Circuit therefore dismissed the appeal as untimely. *Id.* at 387.

This Court reversed in view of the "unique circumstances" and directed the Seventh Circuit to consider the appeal on the merits. *Id.*; *see also Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962) (recognizing the "unique-circumstance doctrine," an equitable exception to the notice-of-appeal timing requirement); *accord Osterneck*, 489 U.S. at 179; *Wolfsohn v. Hankin*, 376 U.S. 203, 203 (1964) (summarily reversing the dismissal of an appeal, based upon the reasoning in *Harris Truck Lines* and *Thompson*). Here, even if Lambert's appeal ordinarily would be deemed to be untimely (which it should not be, as discussed in detail above), *Thompson* dictates that because the district court orally assured Lambert that a reconsideration motion could be filed by March 12, 2015, the time to appeal ran from the district court's disposition of the March 12 reconsideration motion, and the present appeal was properly adjudicated on the merits.

Although this Court in *Bowles v. Russell*, 551 U.S. 205 (2007) overruled *Harris Truck Lines* and *Thompson* "to the extent they purport to authorize an exception to a jurisdictional rule," *Bowles* did not overrule these cases as applied to nonjurisdictional time prescriptions. *Bowles*, 551 U.S. at 214; *see also Mobley v. C.I.A.*, 806 F.3d 568, 577 (D.C. Cir. 2015) (citations omitted).[7] Indeed, the D.C. Circuit recently

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[7] As correctly concluded by the Ninth Circuit (and unchallenged by Nutraceutical), the 14-day deadline in Rule 23(f) is nonjurisdictional because it does not appear in a statute. Pet.

applied the unique-circumstances doctrine to excuse the untimely filing of a post-judgment motion. *Mobley*, 806 F.3d at 577-78; *see also Khan v. U.S. Dep't of Justice*, 494 F.3d 255, 258-60 (2d Cir. 2007) (concluding that *Bowles* did not alter the ability of a court to recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950.1 (4th ed. Apr. 2018 update) (recognizing that a nonjurisdictional time period "should be subject in appropriate cases to the 'unique circumstances' doctrine"). Application of the unique-circumstances doctrine to nonjurisdictional time prescriptions is fully consistent with this Court's precedents. As Justice Ginsburg explained, this Court's decisions in *Thompson* and *Harris Truck Lines* are "based on a theory similar to estoppel," and time limits found in the Federal Rules should be treated like "[t]ime requirements in lawsuits," which "are customarily subject to 'equitable tolling.'" *Carlisle v. United States*, 517 U.S. 416, 435-36 (1996) (Ginsburg, J., concurring) (quoting 4A Wright & Miller, Federal Practice & Procedure § 1168, at 501); *see also Bowles*, 551 U.S. at 216 (Souter, J., dissenting) (recognizing that nonjurisdictional time limitations "may be waived or mitigated in exercising reasonable equitable discretion[]").

App. 10; *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 (2017) ("If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional, . . . otherwise, the time specification fits within the claim-processing category."); Fed. R. Civ. P. 82 (providing that the Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts").

This Court's decision in *Schacht v. United States*, 398 U.S. 58 (1970) is also instructive. There, the petitioner filed a petition for a writ of certiorari outside the time period permitted by the Rules of this Court, and the Government argued that the Court could not consider the merits of the petition because the time period in the Rules cannot be waived. *Schacht*, 398 U.S. at 63. Rejecting the Government's view, this Court explained that the time period to file a petition for a writ of certiorari in a criminal case is not a jurisdictional rule, and that the Rule "contains no language that calls for so harsh an interpretation." *Id.* at 63-64. Rather, the Court explained that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64; *see also Bowles*, 551 U.S. at 212.

These cases are consistent with this Court's longstanding recognition that cases should not turn on technicalities in the notice-of-appeal context. For instance, in rejecting the notion that a defect in a notice of appeal was fatal to the appeal, this Court concluded that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962). Similarly, although Appellate Rule 3 requires a "notice of appeal" in order to seek appellate review of a district-court decision and sets forth specific requirements for the notice, this Court held that a document that does not strictly comply with Rule 3 (such as a brief filed in lieu of a proper notice of appeal) can sometimes suffice. *Smith v. Barry*, 502 U.S. 244, 248-50 (1992); *see also Becker v. Montgomery*, 532 U.S. 757, 768 (2001) (concluding that

an appellant's failure, in violation of the Rules, to sign a notice of appeal was not fatal to the appeal, and finding that the court of appeals should have accepted the appellant's corrected notice of appeal); *cf. Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (recognizing, in the class-action context, that "finality [for purposes of appeal] is to be given a practical rather than a technical construction"); *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 387 (1978) (refusing to give the separate-judgment requirement an interpretation that would defeat a party's appellate rights "where the notice did not mislead or prejudice the appellee") (internal quotation marks omitted). Because the Rules are designed to maximize the adjudication of appeals on their merits, there is simply no support for Nutraceutical's argument that nonjurisdictional claim-processing rules are categorically immune to equitable exceptions.

This Court's treatment of claim-processing rules concerning appellate practice is consistent with the overarching goal that the Federal Rules be construed to favor an adjudication of claims on the merits. This Court has noted that the Rules generally should not be construed to require "summary dismissals," and instead should "not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *see also* Fed. R. Civ. P. 1 (providing that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). "The Federal Rules reject the approach that pleading is a game of skill in which one

misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (citation omitted); *see also Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (recognizing that the Federal Rules of Civil Procedure "are designed to discourage battles over mere form of statement" and that Rule 8(a)(2) "indicates that a basic objective of the rules is to avoid civil cases turning on technicalities") (citations omitted).

In seeking a rule to the contrary (Pet. 16-18), Nutraceutical misreads language from *Manrique v. United States*, 137 S. Ct. 1266 (2017) and *Eberhart*, in which this Court stated that claim-processing rules are "unalterable." *Manrique*, 137 S. Ct. at 1272; *Eberhart*, 546 U.S. at 15. This language, however, is taken from *Kontrick*, which specifically left open the possibility that claim-processing rules "could be softened on equitable grounds[,]" but did not reach the issue because the Court found a forfeiture of the right to enforce the rule. *Kontrick*, 540 U.S. at 456-57. Nor did *Manrique* or *Eberhart* have occasion to address the applicability of equitable exceptions. *Eberhart*, like *Kontrick*, found that the Government had forfeited the opportunity to enforce the claim-processing rule at issue, and the question of equitable exceptions therefore did not arise. *See Eberhart*, 546 U.S. at 19. And in *Manrique*, no argument was made that equitable exceptions could apply, and the Court's decision was therefore addressed only to the issues of whether: (i) the claim-processing rule at issue had been violated; and (ii) any violation could be overlooked merely because the Government was not harmed by the

violation. *Manrique* and *Eberhart* therefore offer no support for Nutraceutical's argument that nonjurisdictional claim-processing rules are immune to equitable exceptions.

In sum, the Federal Rules and this Court's precedents simply do not support Nutraceutical's proposed rule that nonjurisdictional claim-processing rules are categorically insusceptible to equitable exceptions.

B. Court-of-Appeals Case Law Further Shows that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

The courts of appeals additionally recognize that nonjurisdictional claim-processing rules can be subject to equitable exceptions. For instance, the Sixth Circuit recognized that Appellate Rule 15(d) is a claim-processing rule that "permits forfeiture and equitable exceptions to the deadline" and therefore granted a motion to intervene despite the untimeliness of the motion under the Rule. *Int'l Union of Operating Eng'rs, Local 18 v. NLRB*, 837 F.3d 593, 596 (6th Cir. 2016). Similarly, the Second Circuit: (i) recognized that Civil Rule 6(b)(2)—which states that certain deadlines are not extendable—is a nonjurisdictional claim-processing rule and is therefore subject to equitable exceptions; and (ii) remanded the case to the district court for a decision on whether waiver or an equitable exception applied to the facts presented there. *Legg v. Ulster Cty.*, 820 F.3d 67, 79-80 (2d Cir. 2016). The Seventh Circuit has likewise applied equitable tolling to Civil Rule 58(c)(2)(B). *Carter v. Hodge*, 726 F.3d 917, 919-20 (7th Cir. 2013); *see also Mobley*, 806 F.3d at

577-78 (finding that equitable considerations excused the untimely filing of a motion under Civil Rule 59(e)); *Khan*, 494 F.3d at 258-60 (2d Cir. 2007) (concluding that a court can recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); *U.S. v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 216 (3d Cir. 2000) (Alito, J., concurring) (noting that "both the Supreme Court and [the Third Circuit] have recognized an equitable exception to Rule 59"). In sum, the courts of appeals, like this Court, recognize that the Federal Rules can be subject to equitable exceptions.

C. The Availability of Equitable Exceptions Has Not Caused the Adverse Consequences that Nutraceutical Fears; However, the Rule Nutraceutical Advocates Will Lead to Circuit Courts Being Presented with 23(f) Petitions that Will Be Amended or Withdrawn as Moot

Nutraceutical alleges that subjecting nonjurisdictional claim-processing rules to equitable exceptions will cause a multitude of adverse consequences, such as "inject[ing] uncertainty into, and prolong[ing], district court proceedings." Pet. 23. Nutraceutical also worries that the availability of equitable exceptions will require courts to "scour the district court record" in order "to determine whether the [putative Rule 23(f) appellant] engaged in any conduct that would entitle him to equitable tolling." Pet. 22. Nutraceutical's concerns are misplaced.

First, Nutraceutical fails to recognize that a court of appeals has no obligation to accept an interlocutory appeal under Rule 23(f). Indeed, "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by [this Court] in acting on a petition for certiorari[,]" and "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. A putative appellant therefore will have no motivation to miss the Rule 23(f) deadline, because a late petition is very unlikely to be granted. Accordingly, it will be unusual for a party to miss the Rule 23(f) deadline, and even rarer for a party to invoke equitable exceptions.

Second, as Nutraceutical admits (Pet. 23), district courts generally need not stay their proceedings while a Rule 23(f) interlocutory appeal is pending. Fed. R. Civ. P. 23(f) ("An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."). Any "uncertainty" or "prolong[ed]" district-court proceedings (Pet. 23) therefore stem from a court's discretionary decision to stay proceedings during the appeal—not from the availability of equitable exceptions to a nonjurisdictional claim-processing rule.

Third, Nutraceutical's concerns about the "uncertainty" (Pet. 23) that equitable exceptions could inject into district-court proceedings are unfounded, as is evidenced by the availability of equitable tolling in the statute-of-limitations context. This Court has long held that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable

presumption' in *favor* 'of equitable tolling.'" *Holland v. Florida*, 560 U.S. 631, 645-46 (2010) (emphasis in original) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). Nutraceutical makes no suggestion that the availability of equitable tolling in this context has caused an undue burden on the federal courts, even though equitable tolling requires a fact-specific analysis. Similarly, there is no reason to suggest that subjecting the Federal Rules to equitable considerations should be unworkable. Indeed, for many years, this Court and the courts of appeals have recognized equitable exceptions to nonjurisdictional claim-processing rules. Nutraceutical points to no evidence of any adverse consequences that have arisen from the application of equitable exceptions in the cases where such exceptions are warranted.

In sum, Nutraceutical's argument for a categorical rule that nonjurisdictional claim-processing rules are insusceptible to equitable considerations has no support in this Court's precedents, in the Federal Rules, or in court-of-appeals case law. Nor has Nutraceutical pointed to any negative consequences that have flowed from the many cases that have applied equitable exceptions to nonjurisdictional requirements. The Ninth Circuit's unremarkable recognition that equitable considerations can apply to nonjurisdictional claim-processing rules therefore does not warrant this Court's review, especially in view of the multiple alternative bases for finding that Lambert's appeal was timely.

Rather than Lambert, it is Nutraceutical that seeks a rule that would waste party and judicial resources. It would have required Lambert, after the district court stated it would reconsider its order and provided a hearing date and briefing schedule for reconsideration, to nonetheless file a petition to appeal the order being reconsidered.

In this scenario, if Lambert had been successful with the motion for reconsideration, he would dismiss his petition, with the time he spent writing it, the time the other side spent opposing it, and the time the Motions Panel spent considering it, all a completely wasted effort. If the district court, as it actually did, modified its order but denied certification, Lambert would have had to file a second petition that explained why the new order was in error.

Either way, Nutraceutical's position, if adopted, calls for the motions panels of our circuit courts to regularly and needlessly consider 23(f) petitions involving orders that are later amended, expanded upon, vacated, modified, or withdrawn because of subsequent motions.

Here, there are only two relevant orders, but in other cases district courts deny certification without prejudice or deny certification pending additional evidence or briefing, often several times. Nutraceutical would have class action litigants on both sides, after receiving unfavorable but non-final decisions on certification, nonetheless barrage circuit courts with petition after petition in order to preserve their right to appeal the eventual final order granting or denying certification.

It is therefore little wonder that not even one of the twenty-three active judges on the Ninth Circuit even called for a vote on Nutraceutical's unsuccessful petition for rehearing *en banc*, much less actually voted for rehearing. CA Rec. 40.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RONALD A. MARRON
COUNSEL OF RECORD
MICHAEL HOUCHIN
THE LAW OFFICES OF
RONALD A. MARRON, APLC
651 Arroyo Drive
San Diego, CA 92103
(619) 696-9006
(619) 564-6665 (fax)
ron@consumersadvocates.com
mike@consumersadvocates.com

GREGORY S. WESTON
ANDREW HAMILTON
THE WESTON FIRM
1405 Morena Blvd., Suite 201
San Diego, CA 92110
(619) 798-2006
greg@westonfirm.com
andrew@westonfirm.com

JONATHAN A. HERSTOFF
HAUG PARTNERS LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
jherstoff@haugpartners.com

Counsel for Respondent